STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the Estate of RUSSELL EUGENE LAWLER, Deceased.	UNPUBLISHED December 27, 2005
JAMES LAWLER, Petitioner-Appellee, v DONALD LAWLER, THOMAS LAWLER, and MARY KAY HANNAH, Respondents-Appellants.	No. 263238 Isabella Probate Court LC No. 03-021744-DE

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

Respondents appeal as of right the probate court's order granting summary disposition under MCR 2.116(C)(10) of their claims that the challenged will was the product of undue influence by petitioner and that the testator lacked the requisite testamentary capacity. We affirm the probate court's grant of summary disposition with respect to testamentary capacity, but reverse and remand as to respondents' claim that the will was the product of undue influence.

We review de novo a trial court's grant of summary disposition. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing a decision under MCR 2.116(C)(10), we consider all documentary evidence in the light most favorable to the nonmoving party, affording all reasonable inferences to the nonmovant, to determine whether there is any genuine issue of material fact that would entitle the nonmoving party to judgment as a matter of law. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 488; 618 NW2d 1 (2000).

A party challenging a will on the ground that it is the product of undue influence has the burden of proving such influence. MCL 700.3407(1)(c). Generally, to establish undue influence it must be shown that the testator was subjected to threats, misrepresentation, undue flattery, fraud or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the testator to act against his inclination and free will. See *In re Peterson Estate*, 193 Mich App 257, 259-260; 483 NW2d 624 (1991). However, in certain situations undue influence will be presumed. *Id*. Undue influence is presumed, for example, when the evidence establishes that (1) there was a confidential or fiduciary relationship between the testator and a devisee, (2) the

fiduciary benefited from the will, and (3) the fiduciary had the opportunity to influence the testator's decision in devising the estate. *Id*. at 260. Upon such proof, there arises "a 'mandatory inference' of undue influence, shifting the burden of going forward with contrary evidence onto the person contesting the claim of undue influence." *In re Mikeska Estate*, 140 Mich App 116, 121; 362 NW2d 906 (1985). In other words, even though a party alleging undue influence must prove that an incident of undue influence occurred, a trier of fact may appropriately infer that such an incident occurred when a party establishes each of the three elements. *Peterson*, *supra* at 259-260. Although in such circumstances the burden of persuasion remains with the party alleging undue influence, "[i]f the defending party fails to present evidence to rebut the presumption, the proponent has satisfied the burden of persuasion." *Mikeska*, *supra*.

Here, the probate court expressly found that the first two elements necessary to establish a "mandatory inference" of undue influence were satisfied, and petitioner does not argue that the court erred in so finding. However, were we required to consider whether a fiduciary relationship existed at the time of the making of the will and whether petitioner benefited under the will, we would conclude that the probate court did not err with respect to issues one and two of the mandatory-inference test. As found by the trial court, the record supports that petitioner held a power of attorney over the testator when the will was executed, which is sufficient to establish the requisite fiduciary relationship.[1] See *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1983). Moreover, it is not disputed that petitioner benefited from the will by having received a bequest of all but $60,000 of petitioner's $446,000 estate, an amount far in excess of his one-fourth intestate share. The issue here is whether, when considered in the light most favorable to respondents, the evidence presented below was sufficient to also show that petitioner had an opportunity to influence the testator in the drafting and execution of the contested will.

"Opportunity" is commonly defined as "a situation or condition favorable for attainment of a goal."[2] *Random House Webster's College Dictionary* (1992). We find that the evidence presented below was sufficient to show a condition or situation favorable to the potential for influence by petitioner. Indeed, an appearance filed with the probate court during the guardianship proceedings indicates that the attorney who drafted the will at issue, Stephen Fox,[3]

---

[1] Shortly before execution of the will petitioner also brought petitions for guardianship and conservatorship over petitioner. The guardianship petition indicates that petitioner held a power of attorney over the testator at that time. In deciding petitioner's motion for summary disposition, the probate court took judicial notice of the record created in those proceedings, which has been appended to the record in this case. See *Snider v Dunn*, 33 Mich App 619, 625; 190 NW2d 299 (1971) ("[a] court may take judicial notice of files and records of the court in which it sits").

[2] "A court may establish the meaning of a term through a dictionary definition." *Fitch v State Farm Fire & Cas Co*, 211 Mich App 468, 472; 536 NW2d 273 (1995).

[3] Although petitioner suggests that he sought the guardianship without an attorney and that Fox later appeared to help only with the conservatorship, such an interpretation ignores the express language used by Fox in his written appearance. Moreover, considering the evidence in the light most favorable to respondents, we draw the "reasonable inference," see *Knauff*, *supra*, that Fox

(continued…)

also represented petitioner in his bid for appointment as both testator's guardian and conservator. These petitions the record suggests were actively opposed by the testator and remained pending at the time the will was both drafted and signed.[4] Record evidence further indicates that petitioner was present at the time the will was signed.[5] Although circumstantial in nature, Fox's adverse representation of petitioner at the time the will was drafted, when viewed in connection with evidence indicating that petitioner was present when the will was signed, was sufficient to show the requisite opportunity for petitioner to exert influence over the testator with respect to that transaction. *Id.*; see also *Daane v Lovell*, 83 Mich App 282, 290; 268 NW2d 377 (1978) ("the factors giving rise to the presumption [of undue influence] are circumstantial evidence that undue influence occurred"); *In re Cox Estate*, 383 Mich 108, 113-117; 174 NW2d 558 (1970) (finding that the evidence supported a presumption of undue influence when an elderly testator's will leaving a sizeable gift to her church was drafted by an attorney also belonging to the church, a rector of which stood in a confidential relationship with the testator). Because the evidence presented below was sufficient to meet the requirements for establishing a presumption of undue influence in the execution of the contested will, against which petitioner offered no contrary evidence, the trial court erred in granting summary disposition in favor of petitioner and dismissing respondents' claim that the will was the product of undue influence. *Peterson*, *supra*; *Mikeska*, *supra*.

Respondents next argue that the probate court erred in dismissing their claim that the testator lacked testamentary capacity to draft and execute the will. We disagree.

In *In re Sprenger's Estate*, 337 Mich 514, 521; 60 NW2d 436 (1953), our Supreme Court explained that "[t]o have testamentary capacity, an individual must be able to comprehend the nature and extent of his property, to recall the natural objects of his bounty, and to determine and understand the disposition of property he desires to make." Because the court begins with a presumption that the testator had the requisite testamentary capacity, the proponent of a will need not present any evidence of testamentary capacity. MCL 600.2152; *In re Powers' Estate*, 375 Mich 150, 151-152; 134 NW2d 148 (1965). Rather, "[t]he burden is upon the person questioning the competency of the deceased to establish that incompetence existed at the time the will was drawn." *Sprenger*, *supra*.

(…continued)

also drafted the will at issue because it is clear that he witnessed it. Because it is supported by the deposition testimony of petitioner's brother, respondent Donald Lawler, we further find it reasonable to infer from the record evidence that petitioner was present at the time the will was signed. In so finding, we note further that although petitioner challenges numerous allegations from respondents as not supported by the record, petitioner never expressly challenged the assertion that it was Fox who drafted the will, or that petitioner was present at the time it was signed.

[4] Although petitioner suggests that it is not entirely clear that the action was pending when the will was executed on October 10, 1991, an order of adjournment issued in those proceedings clearly shows that the petition was still pending when the will was executed because the order of adjournment was filed on November 25, 1991.

[5] See note 3, *supra*.

In challenging the decedent's testamentary capacity respondents cite the mental infirmities which prompted the appointment of a temporary guardian several months before execution of the contested will, the unequal distribution of the testator's estate, and the possibility that the testator was unduly influenced in the execution of the will. However, as acknowledged by respondents, the fact that a testator has been adjudged incompetent in a guardianship proceeding, although probative, is not conclusive of the testator's capacity to validly draft and execute a will. See *In re Paquin's Estate*, 328 Mich 293, 302; 43 NW2d 858 (1950). To the contrary, "[w]eakness of mind and forgetfulness are insufficient to invalidate a will if it appears that the mind of the testator was capable of attention and exertion when aroused." *Id*. Moreover, the competency of a testator is judged at the time of the making of the will. *Sprenger*, *supra*. As noted by the probate court in its opinion and order granting summary disposition, the temporary guardianship resulting from the infirmities cited by respondent was permitted to lapse a number of months before the will at issue here was made, and a permanent guardian was never appointed. Further, the record demonstrates that several medical examinations conducted following the lapse of the temporary guardianship, including one conducted by the testator's personal physician just six days before the will was executed, revealed that the testator's mental faculties had significantly improved since the guardianship was ordered and that he possessed the requisite state of mind to draft and execute a will.

Given the presumption that the testator had testamentary capacity, and considering that the testator was determined by his physician to be mentally competent to draft a will, we find that respondents have failed to present evidence sufficient to establish a genuine issue of material fact regarding testator's testamentary capacity at the time the will was executed. Consequently, the probate court did not err in dismissing respondents' claim that the testator lacked testamentary capacity.

Accordingly, we affirm in part, reverse in part, and remand this matter for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Alton T. Davis